

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

RICHMOND DIVISION

**COMMONWEALTH OF
VIRGINIA EX REL. KENNETH
T. CUCCINELLI, II,
in his official capacity as Attorney
General of Virginia,
Plaintiff,**

v.

**KATHLEEN SEBELIUS,
Secretary of the Department
of Health and Human Services,
in her official capacity,
Defendant.**

No. 3:10-cv-00188-HEH

**BRIEF OF AMICUS CURIAE YOUNG INVINCIBLES IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

FINANCIAL DISCLOSURE

The Internal Revenue Service has determined that the fiscal sponsor, Center for Community Change, of *Amicus* for this brief is organized and operated exclusively for charitable or educational purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and are exempt from income tax. As such, *Amicus* have nothing to report under Local Civil Rule 7.1(A)(1)(a).

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INTEREST OF THE AMICUS CURIAE

Young Invincibles is a non-profit, non-partisan organization that advocates on behalf of young adults ages 18 to 34.¹ Founded by a group of students and young adults during the health care reform debate, Young Invincibles sought to provide a voice for young adults in a process that too-often excluded young people. The name “Young Invincibles” comes from an insurance industry term, describing the idea that so many young adults are uninsured because of their perceived “invincibility.” But the real experiences of young adults revealed that in fact the opposite is true - young people wanted quality insurance but could not afford it under the status quo that existed before the Patient Protection and Affordable Care Act (“PPACA”). Young Invincibles quickly built a coalition of over twenty national youth-focused organizations with a combined membership of more than 1.5 million young adults. The coalition adopted a policy platform that would provide comprehensive, affordable coverage for the generation with the lowest insurance coverage rate of any age group.²

Young Invincibles has continued its work to give young adults a voice in the legislative, regulatory and legal processes by informing lawmakers and relevant actors about the unique needs of young adults and organizing grassroots campaigns to educate its constituency. The focus of this work is formed through interaction with thousands of young adult members around the country and extensive research on relevant issues. The goal is to represent young adults as an age group in the same way that AARP stands for the interests of Americans over the age of 50. Currently, no advocacy organization provides a comparable voice for young adults. This under-representation is linked to the lack of economic resources and opportunity. Over 12.2 million young adults live below the poverty line, and working adults in their twenties earn on average

¹ For more information about the organization, *see* Young Invincibles, www.younginvincibles.org/About, accessed last September 13, 2010.

² *See* YI Want Change, www.yiwantchange.org.

about 20% less than their older counterparts. Young Invincibles analysis of U.S. Census. (2009-2010). *Current Population Survey: Annual Social and Economic Supplement*, (last accessed September 20, 2010), available at http://www.census.gov/hhes/www/cpstc/cps_table_creator.html ("U.S. Census"). Unemployment for individuals ages 18 to 34 rose 5.9% in the past three years alone, and is currently 3.2% higher than the population as a whole. *Id.*

Now, of all of the parties and *amici* to the lawsuits surrounding the PPACA, no other organization will present the desperate situation young adults faced in the pre-PPACA health care status quo. About 21 million young adults are uninsured, but the provisions in the PPACA, if fully implemented, would help provide coverage to over 70% of the uninsured young adults in the country, and provide both improved consumer protections and more affordable, better quality health care for millions more young adults. See YI Want Change, *Comprehensive Insurance: Not Insurance In Name Only: YIWC Analysis of Catastrophic Plan and Dependent Coverage*, (December 2009).

SUMMARY OF THE ARGUMENT

Most of the major provisions of the PPACA affect young adults. Plaintiff's complaint suggests that the PPACA impermissibly burdens young people; the reality is quite the contrary. The PPACA will provide access to affordable health care for the vast majority of uninsured young adults, and the possibility of quality care for millions of underinsured young individuals.³ Kaiser Commission on Medicaid and the Uninsured, *Underinsured in America: Is Health Coverage Adequate?* July 2002, available at <http://www.kff.org/uninsured/upload/Underinsured-in-America-Is-Health-Coverage-Adequate-Fact-Sheet.pdf>. The minimum coverage provision at

³ Underinsured are defined as those who "have health insurance but face significant cost sharing or limits on benefits that may affect its usefulness in accessing or paying for needed health services."

issue in this case does not impose a significant burden on young adults. On the other hand, eliminating this and other key pillars of the PPACA would undermine the entire law and harm the physical and economic health of millions of young Americans by denying them access to affordable health care.

Young adults make up 26% of the population under the age of 65, but account for 42% of that population's uninsured. U.S. Census. When health insurance is affordable and available, young adults eagerly enroll at rates similar to older Americans. Jennifer Nicholson, et al., Commonwealth Fund, *Rite of Passage: Young Adults And the Affordable Care Act of 2010*, (2010) at 11, available at <http://www.commonwealthfund.org/Content/Publications/Issue-Briefs/2010/May/Rite-of-Passage-Young-Adults-and-the-Affordable-Care-Act-of-2010.aspx> ("Rite of Passage 2010"). The high rate of uninsured young adults does not reflect a free choice by young Americans to go without insurance, but rather the lack of affordable, worthwhile coverage options. The majority of young Americans favor the PPACA, in part because of the pervasiveness of coverage barriers for uninsured young adults. *Gallup*, June 22, 2010, available at <http://www.gallup.com/poll/140981/Verdict-Health-care-Reform-Bill-Divided.aspx>.

Despite the relatively good health of young adults, they suffer significant economic and health consequences from their lack of insurance coverage. Young adults without insurance are likely to avoid seeking medical care because they cannot afford it, which inevitably affects their health. Nearly one-third of uninsured young adults said their health situation had worsened because they did not have insurance. Commonwealth Fund, *Affordable Care Act Has Potential to Extend Health Insurance to Up to 13.7 Million Uninsured Young Adults, Protect Young Adults from Medical Debt* 2010, at 2, available at <http://www.commonwealthfund.org/~media/Files/News/News%20Releases/>

2010/May/Rite%20of%20Passage/Rite%20of%20Passage%20releaseFINAL%2051910%20rev.pdf. Young adults need affordable insurance to maintain good health and prevent them from burdening the medical system when their health deteriorates because they are unable to access the system when they could obtain cheaper, earlier treatment provided by basic insurance coverage. By requiring that all Americans get insurance, the PPACA will lower prices to a level young adults can afford. See Gallup, *Income Trumps Health in Young Adults' Coverage*, February 26, 2010, available at <http://www.gallup.com/poll/126203/Income-Trumps-Health-Status-Young-Adults-Coverage.aspx> ("Income Trumps"). Creating affordable individual insurance will also provide young adult often looking to go back to school, change jobs, make an interstate move, or generally build their careers and their families, with the financial flexibility and variety of options to switch from the coverage they might currently have. The availability of reasonably priced, portable coverage would have a strong positive effect on interstate commerce as it would allow young adults to move freely to more productive jobs.

In practice, the minimum coverage provision will not require young adults to purchase coverage unless they can otherwise afford to do so at a reasonable price. Subsidies in the form of government tax credits are available for anyone whose family income is less than 400% of the poverty line; approximately two-thirds of young adults will qualify. U.S. Census. More than half the uninsured young adults in America will be eligible for the Medicaid expansion, which covers childless adults with family incomes up to 133% of poverty. *Id.* The Act's tax penalties for failing to maintain minimum coverage will not be assessed against anyone whose family is below the poverty line. 26 U.S.C. § 5000A(e)(1)(B). Nor will they be assessed against anyone who is not in a position to purchase coverage that costs him or her less than 8% of his or her income. *Id.* at § 5000A(e)(1)(A). Thus, the only persons who are required to purchase insurance

are those who are fully capable of doing so and choose instead to take their chances that they will remain healthy, on the expectation that if they do get sick, they will be able to pass the costs off on others through higher total costs throughout the system.

The PPACA's minimum coverage provision, end to discrimination based on preexisting conditions, expansion of Medicaid and creation of tax credits are all essential pieces of a regulatory scheme that provides young adults with affordable care. These provisions collectively provide an opportunity for young adults to get the medical treatment they need without depleting their finances or limiting life opportunities. The minimum coverage provision is an essential piece of the regulatory scheme through which to provide these improvements and without which the system cannot function.

The *amicus* will show by raw data and detailed analysis that the PPACA is vital to the health status of young adults. *Amicus* will dispute the claims brought by opposing parties seeking to portray young adults as victims of reform, when in fact the PPACA will benefit this age group more than any other population segment. Accordingly, *amicus* will show that each challenged aspect of the PPACA, including the minimum coverage provision, serves as an integral part of a federal regulatory scheme that drastically improves the health and lives of millions of young adults.

ARGUMENT

Young adults both want and need health insurance, and their interests are substantially affected by the decisions made and arguments presented in this case. The disproportionately high uninsurance rate for young adults under the pre-PPACA status quo has severe consequences for this population. As a result, the PPACA offers tremendous opportunities for improvements

in the health and financial status of young adults, particularly provisions made possible by the minimum coverage requirement and the Medicaid expansion.

I. Because young adults are generally low-income and lack access to affordable health care, they are disproportionately uninsured not by choice, but by circumstance.

The myth of the “young invincibles” stems from the high uninsurance rate for young adults, from which it is falsely inferred that young adults do not want to buy insurance coverage. Young adults, however, have reduced access to universal forms of coverage such as group insurance. They also earn far less than older adults, making individual insurance unaffordable. As a result, young adults remain uninsured in much higher numbers than older Americans not by choice, but due to circumstance.

A. Young adults are less likely to have access to employer-sponsored coverage.

Young adults more often lack access to employer-sponsored health insurance, which is the source of insurance for the vast majority of Americans.¹ Only 53% of young adults ages 19 to 29 have access to employer-sponsored insurance, compared to 76% of adults over 30. *Id.* Without the option of insurance from a job, and with limited access to Medicaid before the PPACA takes full effect, this low-income population is forced into the unsubsidized individual market, which is largely unaffordable.

B. Quality insurance on the individual market is expensive for young adults, particularly those with preexisting conditions.

Purchasing insurance on an unsubsidized individual market is too costly for young adults. The average annual cost of an individual plan offered to a relatively healthy 27-year old is \$1,723.⁴ AHIP Center for Policy Research, *Individual Health Insurance 2009: A Comprehensive Survey of Premiums, Availability and Benefits* (October 2009). To put this in perspective, the

⁴ This estimate only covers those who actually decide to take up individual coverage, and does not include higher premium offers for those with conditions making coverage more expensive, forcing them out of the individual market altogether.

average young adult with no access to employer-sponsored insurance earns \$14,746 per year, making individual plans effectively unattainable. *Id.*

Premiums for those with a preexisting medical condition are even higher. *Id.* The “offer rate” on the individual market for a young adult between 18 and 34 with a preexisting condition (the frequency with which the consumer is offered coverage by an individual market insurer) is roughly equal to someone with preexisting conditions between the ages of 35 and 49. But the individual between the ages of 35 and 49 is a full 15% more likely to have coverage through their employer. *Id.*; U.S. Census. This means that young adults with preexisting conditions have fewer options than their 35 to 49 year-old counterparts with preexisting conditions. If they are offered insurance at all on the private market, it is at an even higher cost than the already unaffordable, unsubsidized rates 18 to 34 year-olds without preexisting conditions are required to pay. Simply put, these young adults have even fewer options available to them.

C. When young adults do have access to affordable coverage, they do in fact enroll.

Studies have shown that when health insurance is made affordable and available, young adults eagerly enroll. When young adults ages 19 to 29 are offered more affordable health insurance through their employers, 78% enroll, compared to 84% of adults over age thirty. Jennifer Nicholson, et al., Commonwealth Fund, *Rite of Passage? Why Young Adults Become Uninsured and How New Policies Can Help*, 2009 Update, 2009, at 6, available at http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2009/Aug/1310_Nicholson_rite_of_passage_2009.pdf (“Rite of Passage? 2009”). The similar enrollment rates when faced with more affordable options demonstrate that uninsurance among young adults reflects the lack of affordable options, not a cultural opposition or considered refusal as some claim.

Moreover, young adults with higher income levels are far more likely to have insurance. The uninsured rate is just 14% for young adults living over 400% of the federal poverty line ("FPL"), but rises to 46% for young adults making less than 200% of the FPL. U.S. Census; *Income Trumps*. With about 37% of young adults living below 200% of the FPL, it is no surprise that young adults have the highest uninsured rate of any age group.

The facts show that when insurance is made more readily available to young adults, either by providing it through employers or by providing an individual option within the economic means of young adults, they get covered. In fact, healthy, higher-income young adults are more likely to have insurance than unhealthy young adults, completely dispelling the invincibility myth. *Income Trumps*. These facts are further confirmed by polls showing that young adults want insurance and are in fact the most supportive of the reform law. Gallup, June 22, 2010, *available at* [http://www.gallup.com/poll/140981/Verdict-Health care-Reform-Bill-Divided.aspx](http://www.gallup.com/poll/140981/Verdict-Health-care-Reform-Bill-Divided.aspx).

D. Because young adults are priced out of the health insurance market, the pre-PPACA status quo left this segment of the population disproportionately uninsured.

Without tax credits or access to Medicaid, young adults ages 18 to 34 make up 26% of the under-65 population, but account for 42% of the uninsured in that age range. U.S. Census. About 21 million young adults are uninsured. *Id.* Millions more remain underinsured, enrolling in barebones coverage that leaves them without access to everyday care. Families USA, *Barebones Insurance Would Do Little to Help Uninsured Working Families*, May 4, 1999, *available at* <http://www.familiesusa.org/resources/newsroom/statements/1999-statements/press-statement-barebones-insurance-would-do-little-to-help-uninsured-working-families.html>. *See also* *See YI Want Change, Comprehensive Insurance: Not Insurance In Name Only: YIWC Analysis of Catastrophic Plan and Dependent Coverage*, December 2009. The high rate of

uninsurance is not voluntary, but caused by the lack of affordable health insurance. This striking rate of non-coverage has serious consequences for young adults, and ultimately for the health care system and the health of the population as a whole.

II. Though healthier than the rest of the population, young adults face serious health and economic consequences as a result of uninsurance.

Not having insurance can have negative health and financial consequences, and artificially restrain the career and educational choices facing adults during this period of their lives. Young adults do suffer from chronic illnesses, as well as catastrophic accidents and more unpredictable health crises; they also need preventive care. Their low incomes mean serious financial troubles when forced to pay out of pocket for health expenses. This financial difficulty limits career and educational flexibility for those saddled with expenses or required to maintain existing coverage in a less productive job. As a result, uninsurance has long-lasting consequences to the health and economic opportunity of young adults.

A. Young adults need medical care to treat chronic conditions, care for sudden accidents or illnesses, and provide critical preventive services.

Many young adults have chronic conditions requiring ongoing care. Approximately 15% of young adults live with a chronic health condition such as asthma, diabetes, or cancer. Rite of Passage? 2009. Another 9% grapple with depression or anxiety disorders. *Id.* These conditions worsen without treatment, resulting in higher health care costs later. Moreover, almost 16% of young adults ages 18 to 24 have what is classified as a “preexisting condition,” and without the PPACA are excluded from the current market altogether.⁵ Families USA, *Health Reform: Help for Americans with Preexisting Conditions*, at 3, available at <http://www.familiesusa.org/assets/pdfs/health-reform/preexisting-conditions.pdf>.

⁵ 15.9% of young adults ages 18 to 24, and 21.3% of young adults ages 25 to 34 have what is classified as a “preexisting condition.”

Additionally, young adults often face sudden accidents or unexpected illnesses. Rates of motor vehicle accidents, sexually transmitted diseases, and substance abuse peak in young adulthood. Robert Fortuna and Brett Robbins, *Dependence on Emergency Contracts among Young Adults in the United States*, (2010), available at <http://resources.metapress.com/pdf-preview.axd?code=vv58867474626077&size=largest>. More accidents mean that young adults ages 19 to 29 find themselves in the emergency room more than any other age group under the age of 75. M. Jane Park, et al., *The Health Status of Young Adults in the United States*, *Journal of Adolescent Health*, 39, (2006), available at <http://download.journals.elsevierhealth.com/pdfs/journals/>. Even the healthiest young adult, then, is never more than an instant from entering the health care market where they will need insurance to afford proper care. Furthermore, preventive care is critical to protect the future health of both the healthy and chronically ill. The need for preventive care, care for chronic illnesses, and emergency care all mean that young adults need coverage.

B. The inability to afford quality insurance results in many of these needs either going unmet or causing young adults to face serious financial difficulties when attempting to pay for care out of pocket.

Unfortunately, the various health care needs of young adults often go unmet, because most young adults without health insurance avoid getting necessary care due to the high cost. More than three-quarters of uninsured young adults reported not seeking medical care because of high costs, compared to just 37% of young adults with insurance. Rite of Passage 2010. Of those uninsured young adults who sought medical attention, 60% reported difficulty paying for their treatment, compared to just 27% of insured young adults. *Id.* Those young adults who do have access to coverage stay tethered to jobs or geographic locations that may limit career prospects or education opportunities.

Young adults generally find it more difficult to pay medical costs when they do access care. Two-thirds of young adults earn below 400% of the FPL, or approximately \$43,320. U.S. Census. This limited-income population has little opportunity to build up savings.⁶ As a result, when they do face a medical crisis, they often face medical bankruptcies at much higher rates than their older counterparts. Michelle Doty, et al., Commonwealth Fund, *Seeing Red: Americans Driven Into Debt By Medical Bills*, August 2005 Issue Brief (2005), at 2, available at http://www.commonwealthfund.org/usr_doc/837_Doty_seeing_red_medical_debt.pdf.

The inability to afford care adversely affects the health of young adults, sometimes permanently. Nearly one-third of uninsured young adults reported their health worsening because they did not access health care soon enough, and almost half (46%) of uninsured young adults with a chronic health condition reported their condition worsened when they did not seek medical treatment due to cost. Rite of Passage: 2010, at 2. These negative effects are not short-lived; failure to treat these conditions often increases young adults' risks later in life for chronic conditions and early death. Andrew Wilper, et al., *A National Study of Chronic Disease Prevalence and Access to Care in Uninsured U.S. Adults*, *Annals of Internal Medicine*, at 170, available at <http://www.annals.org/content/149/3/170.full.pdf+html>.

These sobering statistics point to the same conclusion: the pre-PPACA status quo was unhealthy for young adults, strained already difficult financial circumstances, and limited economic and educational opportunities. Each aspect of the regulatory scheme – the minimum coverage provision, the Medicaid expansion, and tax credits – are essential to give this generation a chance at a healthy and financially stable future.

⁶ The average net worth of a young adults household under the age of 35 actually decreased by almost 25% between 2004 and 2007 (almost all other age groups either increased in that period; only 55 to 64 had a slight decrease). Patrick Purcell, Congressional Research Service, *Retirement Savings and Household Wealth in 2007*, (April 2009), available at <http://www.policyarchive.org/handle/10207/bitstreams/19203.pdf>.

III. The PPACA will offer affordable insurance to the majority of uninsured young adults.

The PPACA has the potential to provide affordable insurance and health care to the majority of young adults, giving the millions of young adults who want and need affordable insurance a stake in the outcome of the present case. The reform law provides welcome relief from these financial barriers.

A. The PPACA allows young adults to avoid debilitating uninsurance through both non-discrimination provisions and the availability of tax credits to purchase insurance on an exchange.

The minimum coverage provision is inextricably interwoven with two other provisions that benefit young adults: the creation of tax credits and exchanges, and the end to discrimination against those with preexisting conditions. Without the minimum coverage position, these essential provisions that make coverage affordable and guaranteed are unsustainable. The PPACA provides insurance tax credits to individuals making up to 400% of FPL, making health care affordable for millions of young Americans. 26 U.S.C. § 36B (2010). Almost 9 million young adults ages 18 to 34 are limited-income, earning between 133% and 400% of FPL, and will qualify for tax credits. U.S. Census. The tax credits are a huge benefit for limited-income young adults, but only work if private health insurance premiums are kept under control. Similarly, eliminating discrimination against preexisting conditions requires broad sharing of risk to keep health care coverage affordable.

These reforms will also have a significant impact on the health care system as a whole. Young adults enroll in employer-provided insurance at rates similar to older adults, so will likely similarly take advantage of the new affordable options. By enrolling in insurance through these reforms, newly insured young adults will be less likely to avoid seeking medical treatment and, as a result, stay healthier and improve the risk pool. This allows the health care system to carry

the cost brought by the needed end to discrimination against those with preexisting conditions - 15% of young adults – ensuring that these young adults gain fair access to the health care system. 42 U.S.C. § 300gg (2010); Rite of Passage? 2009.

B. Expanding Medicaid will cover millions of young adults who currently only access the health care market when they are forced to.

Because so many uninsured or underinsured young adults are low-income, providing low or no-cost access to care to those that can least afford it will create an enormous benefit for this generation. The PPACA requires states to expand Medicaid coverage to all individuals making less than 133% of FPL, regardless of whether the individual has a child or a disability. 42 U.S.C. § 1396a (2010). Before the PPACA, states generally only covered young adults with children. The expansion of Medicaid will cover up almost 58%, or over 6.6 million, of uninsured Americans ages 19 to 34.⁷ U.S. Census. Access to this coverage will allow unhealthy young adults to treat their conditions, give healthy young adults an option to maintain their health, and generally provide a health care backstop for a generation finding themselves jobless, in life transitions, and with little stable income. Young adults leaving for education or better career prospects elsewhere will be safe in the knowledge that they will not be denied coverage.

The PPACA extends Medicaid, creates tax credits for low-income Americans, and ends preexisting condition discrimination, all provisions that are critical for this generation and rely on the minimum coverage requirement for the system to work.

IV. The minimum coverage provision is an essential part of a reform regulatory scheme that significantly benefits the long-term health and economic prospects of young adults.

The benefits to young adults of the insurance tax credits and exchange participation cannot be realized without the inclusion of the minimum coverage provision. The status quo

⁷ At age 19, a young adult who was receiving Medicaid through the parents will no longer be eligible.

creates an indirect tax on premiums to cover necessary treatment of uninsured individuals, making individual coverage unaffordable for young adults – a predicament discussed previously. By including a minimum coverage provision, the PPACA removes the indirect tax to individual plans, which make premiums unaffordable. Moreover, including the important ban on preexisting condition discrimination, and tax credits, but no minimum coverage provision, would mean that the sickest individuals would seek coverage first. This could increase premiums by up to 27% and make insurance coverage even less affordable for young adults. Jonathan Gruber, Center For American Progress, *Health Care Reform is a 'Three-Legged Stool': The Cost of Partially Repealing the Affordable Care Act* (2010), at 5, available at http://www.americanprogress.org/issues/2010/08/pdf/repealing_reform.pdf. Relatedly, many uninsured individuals might wait until they are sick to enter the market or receive care from community health centers, a cost that ultimately the insured population must bear – again making premiums unaffordable. Without the minimum coverage provision, young adults are more likely to be priced out of the new exchanges than older, wealthier, age groups.

Importantly for young adults, this increase in premium price would also make tax credits and Medicaid expansion unaffordable. The minimum coverage provision is thus essential to covering both limited-income young adults through affordable tax credits and guaranteed issue to those with preexisting conditions, and will ultimately lower premiums for all young adults. The minimum coverage provision is also essential to offering Medicaid coverage to young adults. By controlling the cost of the tax credits for low-income individuals, the federal government is able to increase support to states and expand Medicaid to a large population of low-income, uninsured young adults. The Act's tax penalties for failing to maintain minimum coverage will not be assessed against any young adult below the poverty line, nor against anyone who cannot

purchase coverage that costs him or her less than 8% of his or her income. 26 U.S.C. § 5000A(e)(1)(A-B).

Providing Medicaid coverage and much-needed tax credits to young adults requires universal minimum coverage, making this provision an indispensable part of a regulatory scheme that alleviates the high uninsurance rates of young adults.

CONCLUSION

For the foregoing reasons, *amicus* supports the Motion for Summary Judgment filed by the Defendant.

Dated: October 1, 2010

Respectfully submitted,

/s/

Brett A. Walter
VSB No. 45976
Attorney for *Amicus Curiae* Young Invincibles
Baach Robinson & Lewis PLLC
1201 F Street, NW, Suite 500
Washington D.C. 20004-1225
Telephone: (202) 833-8900
Facsimile: (202) 466-5738
Electronic mail: brett.walter@baachrobinson.com

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2010, I electronically filed the foregoing by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 1, 2010

_____/s/
Brett A. Walter
VSB No. 45976
Attorney for *Amicus Curiae* Young Invicibles
Baach Robinson & Lewis PLLC
1201 F Street, NW, Suite 500
Washington D.C. 20004-1225
Telephone: (202) 833-8900
Facsimile: (202) 466-5738
Electronic mail: brett.walter@baachrobinson.com